May 28, 2004

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN No. 3064-AC81

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1188

Public Information Room
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 04-09

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2004-16

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Fair Credit Reporting Medical Information Regulations

Ladies and Gentlemen:

This comment letter is submitted on behalf of American Financial Services Association ("AFSA") in response to the notice of proposed rulemaking ("Proposal") issued by the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies") concerning the medical information regulations required by the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). The Proposal, in part, would provide exceptions to the FCRA's broad prohibition on creditors obtaining or using medical information for credit eligibility decisions. AFSA appreciates the opportunity to comment on this very important topic.

AFSA is the national trade association for market funded providers of financial services to consumers and small businesses. These providers offer an array of financial services, including unsecured personal loans, automobile loans, home equity loans and credit cards

through specialized financial institutions. The mission of AFSA is to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service; (2) promoting a financial system that enhances competitiveness; and (3) supporting the responsible delivery and use of credit and credit related products.

Background

Section 411 of the FACT Act amends section 604 of the FCRA to limit the ability of creditors to obtain or use medical information in connection with credit eligibility determinations.[1] Section 604(g)(2) of the FCRA states that: "Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit." This prohibition applies to any "creditor." The FCRA defines the term "creditor" to have the same meaning as in section 702 of the Equal Credit Opportunity Act ("ECOA").[2] Section 702 of the ECOA defines "creditor" as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[3] As a result, the prohibition in section 604(g)(2) would prohibit any lender or arranger of credit or any assignee of a creditor from obtaining or using medical information in connection with a credit eligibility determination.

Section 604(g)(5)(A) of the FCRA requires the Agencies to "prescribe regulations that permit transactions under [section 604(g)(2)] that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs . . . consistent with the intent of [section 604(g)(2)] to restrict the use of medical information for inappropriate purposes." The Proposal would adopt the general rule of section 604(g)(2) prohibiting creditors from obtaining or using medical information in connection with credit eligibility determinations and also would adopt the FCRA definition of "creditor."[4] In addition, the Agencies each propose substantially identical exceptions to the general prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations.[5]

Adverse Effect of Limiting the Scope of the Exceptions

The Agencies' proposed regulations differ in one important respect. Each Agency's regulations would only apply to the creditors that the respective Agency views as being subject to its jurisdiction.[6] In general, the Proposal would apply to institutions chartered as banks,

[1] Section 411 of the FACT Act also amends section 603 of the FCRA to limit the ability of consumer reporting agencies to disclose medical information and to limit the ability of affiliates to share medical information.
[2] FCRA § 603(c)(5).
[3] 15 U.S.C. § 1691a(e).
[4] Proposed § __.30(a).
[5] Proposed §§ ___.30(c)-(d).
[6] The statutory basis for these jurisdictional determinations is not stated and is unclear. The determinations do not appear to be related to any specific jurisdictional statement in the FCRA and may even be based on inconsistent theories. For example, the FDIC proposal refers to "other entities or persons with respect to which the FDIC may

savings associations or credit unions, and the affiliates of these institutions. The section 604(g)(2) prohibition, however, applies to lenders and arrangers of credit, whether or not these entities are banking institutions or affiliated with banking institutions. In effect, no creditor, whether the creditor is a banking institution or an unrelated entity, may obtain or use medical information in connection with a credit eligibility determination, except as provided for in a regulation or order by the Agencies under section 604(g)(5)(A).[7] As a result of the broad statutory prohibition and the limitation of the scope of the proposed exceptions to banking institutions and some affiliated or related entities, many creditors would be prohibited from obtaining or using medical information in connection with credit eligibility determinations, but only a limited group of creditors would be able to rely on the exceptions. In many cases, the persons that would be unable to rely on the exceptions would be the nonaffiliated business partners of covered banking institutions.

Although AFSA supports the Agencies' efforts to create regulations containing exceptions for obtaining and using medical information, AFSA is concerned that the scope of the Proposal does not effectively recognize the day-to-day realities of the uses of medical information in the provision of financial services, including credit. The unavailability of these exceptions to entities that would not be covered by the Proposal could have a significant adverse effect on banks and on the availability of medical services and products to consumers, particularly consumers that lack, or have limited, medical insurance.

Doctors, and other non-bank entities, play a crucial role in the process of making financing options available in medical transactions because they are uniquely situated to inform consumers about options related to paying for health care. In today's market, doctors often must consider a patient's ability to pay when devising treatment plan options. As the first link in the chain for determining health care options, it is critical that doctors be able to present patients not only with options for a course of treatment, but with payment options as well, so that consumers can make informed decisions regarding their medical treatment.

If a patient visits a doctor, the doctor diagnoses the problem and develops treatment options for the patient. Frequently, insurance is unavailable, and payment options are given equal weight as treatment options. Because doctors know that payment concerns are a primary determinant in individual decisions on whether to pursue the suggested treatment options, doctors will offer a patient several options on how to pay for the recommended treatment. Among the options doctors may offer are payment plans to the office and third-party payment plans designed specifically for medical services. By limiting the exceptions for obtaining and using medical information to banking institutions and their affiliates, the Agencies will create a

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exercise its enforcement authority under any provision of law," but this language does not appear in the other Agencies' proposals.

[7] Exceptions created under section 604(g)(3)(C) only affect whether information is treated as a consumer report. In certain cases, a creditor would not be able to obtain or use information that is considered to be a consumer report and, therefore, would not be able to obtain or use information unless an exception under that section applies. Specifically, section 604(g)(3)(C) provides an exception to the FCRA's limitations on affiliate sharing of medical information if the information is disclosed "as otherwise determined to be necessary and appropriate, by regulation or order . . . by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 621(b))."

situation that reduces access to quality medical care as consumers choose to forgo important procedures because of the uninformed belief that they will not be able to afford the procedure.

The same scenario of insufficient information leading to uninformed medical decisions also will play out in medical supply stores. If a store owner is unable to inform consumers of payment options for equipment, such as wheelchairs, consumers may forgo needed medical devices due to the mistaken belief that they lack the ability to pay for their care.

AFSA believes that the final rule must account for the day-to-day realities of the uses of medical information in the provision of financial services. The Agencies must be aware of the impact on the availability of medical services and products to consumers that will result if the exceptions for obtaining and using medical information are not available to entities that would not be covered by the Proposal.

The Agencies are Authorized to Write Regulations that are Enforced by Other Agencies

AFSA believes that the Agencies have the authority to write rules under section 604(g)(5)(A) of the FCRA that apply to creditors that are outside the scope of the Proposal. Section 604(g)(5)(A) does not limit the persons that may rely on the exceptions created by any of the Agencies under that provision. Accordingly, read literally, the exceptions created by each Agency's rules can apply to all creditors unless the Agencies intentionally limit the scope of the exceptions.

AFSA believes that there is no reason to limit the scope of the exceptions. Each of the Agencies can be expected to create responsible exceptions. If a particular Agency identifies a necessary and appropriate exception that had not been identified by the other Agencies, all creditors and consumers should benefit from that exception. Having one Agency create exceptions that apply to institutions that are subject to the enforcement authority of the other Agencies does not usurp the authority of the other Agencies. Further, having multiple Agencies create exceptions will not result in irreconcilable conflicts. For example, unlike the Truth in Lending Act ("TILA") where the goal of uniformity effectively precludes multiple rules, the section 604(g)(5)(A) exception authority is limited to exceptions and, as a result, does not raise the possibility of creating irreconcilable conflicts between the exceptions. The exceptions created by the Agencies would be additive. One Agency would not be specifying that a creditor must take a particular course of action while another Agency would be prohibiting the creditor from taking that action. Thus, it is not necessary to the operation of the prohibition and the exceptions that the Agencies coordinate their exceptions, although such coordination would be desirable for a variety of reasons. Although this structure of multiple agencies being authorized to create potentially overlapping exceptions to a prohibition is uncommon, the breadth of the prohibition in section 604(g)(2) itself and its potential effects on retail credit markets is unique. This broad prohibition calls for liberal exceptions to avoid disruption of credit transactions that are important to consumers and their health.

Other Laws

Nothing in other law or tradition suggests that section 604(g)(5)(A) should be read in any other way but literally. In the area of regulation of financial institutions, it is common for a statute to designate a particular agency to prescribe rules that apply to a broad array of entities, even though that agency may not have any other relationship to some entities subject to those rules. In many cases, in a separate section, these statutes designate other agencies to enforce the provisions of the statute, often according to the jurisdiction of the relevant federal agency under other law and relying on the enforcement powers specified by that other law. For instance, this model is followed by the Electronic Fund Transfer Act[8] (consumer electronic banking transactions), the Equal Credit Opportunity Act[9] (discrimination in credit), the Expedited Funds Availability Act[10] (availability of funds deposited in bank accounts and the collection and return of checks) and TILA[11] (credit disclosures). Section 604(g)(5)(A) of the FCRA follows this same model. Rule writing is authorized under section 604(g)(5)(A) and enforcement by the rule writing and other agencies is specified in section 621.

The FCRA

The FCRA itself, as amended by the FACT Act, includes an array of rule writing models ranging from rule writing authorizations that are limited to those entities that are subject to the rule writing agency's enforcement authority under the FCRA, to provisions that authorize a single agency to write rules that apply to entities regardless of the enforcement scheme specified in the FCRA or any other law. The rule writing authorizations in the FCRA fall into two categories. The first category of rule writing authorizations permits or requires multiple agencies to write rules that apply to the entities that fall under those agencies' administrative enforcement jurisdiction in section 621 of the FCRA. For example, section 615(e) of the FCRA directs the Agencies and the Federal Trade Commission ("FTC") to establish "red flag" guidelines and prescribe regulations, "with respect to the entities that are subject to their respective enforcement authority under section 621" of the FCRA. Similarly, sections 605(h), 623(e) and 628 and a note to section 624 of the FCRA direct the Agencies and the FTC to write rules "with respect to the entities that are subject to their respective enforcement authority under section 621" of the FCRA.

The second category of FACT Act rule writing authorizations permits or requires an agency or agencies to write rules that cover entities that are both within, and beyond, the agency's or agencies' administrative enforcement jurisdiction under the FCRA. For instance, section 615(h) of the FCRA directs the FRB and the FTC to jointly prescribe rules to implement the risk-based pricing notice requirement, including providing exceptions to the requirement. This notice requirement applies to any person that uses a consumer report in connection with an application for, or a grant, extension or other provision of, credit. Accordingly, the rules written under this provision will apply to national banks, federal savings associations and federal credit unions, even though these institutions are not under the enforcement jurisdiction of the FRB or the FTC under section 621 of the FCRA. Section 615(d)(2) of the FCRA requires the FTC, in consultation with the Agencies, to write rules

[8] 15 U.S.C. §§ 1693-1693r.
[9] 15 U.S.C. §§ 1691-1691f.
[10] 12 U.S.C. §§ 4001-4010.
[11] 15 U.S.C. §§ 1601-1615, 1631-1649, 1661-1665(b), 1666-1667f.

requiring enhanced disclosure of prescreening opt outs. This regulation applies to any user of a consumer report making a prescreened offer of credit or insurance, including banks and others that are not subject to the enforcement authority of the FTC under the FCRA or the Federal Trade Commission Act. Similarly, section 623(a)(7) of the FCRA requires the Board to prescribe a model notice to be used by any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to the national consumer reporting agencies.

The Agencies Should Expand the Scope of the Exceptions to Cover All Creditors

AFSA strongly urges the Agencies to expand the scope of the exceptions to the prohibition against obtaining and using medical information so that consumers, particularly consumers that lack, or have limited, medical insurance, will not be limited in their access to medical services and products and so that banks will not be limited in their ability to provide financing to these consumers.

AFSA believes that the exceptions to the prohibition against obtaining and using medical information should be available to any creditor that is also covered by the prohibition. The structure of section 604(g) of the FCRA reinforces the view that the section 604(g)(5)(A) exceptions should apply to all creditors. As noted above, section 604(g)(2) of the FCRA refers to exceptions under both section 604(g)(5)(A) and section 604(g)(3)(C). In stark contrast to section 604(g)(5)(A), which does not limit the applicability of the exceptions established under that subparagraph, section 604(g)(3)(C) specifically delineates the coverage of the exceptions under the Agencies' regulations. Section 604(g)(3)(C) provides an exception to the FCRA's limitations on affiliate sharing of medical information if the information is disclosed "as otherwise determined to be necessary and appropriate, by regulation or order . . . by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 621(b))."

Consequently, section 604(g) of the FCRA itself includes rule writings that fit in both rule writing categories addressed above—rule writings that apply to entities for which the rule writer has enforcement authority under the FCRA and rule writings where the enforcement authority of the rule writer under the FCRA is irrelevant. Clearly, where Congress intends to limit the coverage of the Agencies' rule writing authority in the FCRA, Congress knows how to do so. There is no evidence of Congressional intent to limit in any way the entities to which the Agencies' rule writing authority under section 604(g)(5)(A) applies. As a result, AFSA strongly urges the Agencies to establish exceptions under section 604(g)(5)(A) that would apply to any creditor that would be prohibited from obtaining or using medical information, although some of these entities would be beyond the Agencies' limited administrative enforcement jurisdiction.

If, for some reason, the Agencies conclude that it is not appropriate to apply the exceptions to all creditors, there are a number of other approaches that the Agencies could adopt that would help mitigate the serious adverse effect on the availability of credit for financing medical services and products. For example, the Agencies could each adopt rules with the same scope as the Proposal, but in addition, the Agencies could adopt a separate, common set of exceptions that would apply to other creditors not covered by the Agencies' rules.

A less comprehensive approach, but an approach that would not disrupt existing medical financing arrangements to the extent of the approach taken under the Proposal, would be for the Agencies to include within the scope of their final rules persons arranging credit on behalf of the entities covered by the Proposal. This approach might be coupled with a joint interpretation of section 604(g)(2) issued by all the agencies that enforce the FCRA, including the FTC, interpreting the language "in connection with any determination of the consumer's eligibility, or continued eligibility, for credit" to exclude persons who arrange credit but do not make decisions concerning the consumer's creditworthiness.

Treating arrangers of credit the same way as the lenders themselves is consistent with the FCRA's use of the ECOA definition of creditor, as well as the use of that definition in the ECOA itself. In the context of the prohibition on obtaining or using medical information, it makes no sense to treat arrangers of credit more harshly than the creditor itself. Put another way, an exception for a creditor effectively can be nullified by failing to provide the same exception to an arranger of credit that is important to the process of bringing borrowers and the creditor together. This approach is also consistent with the theory of the Bank Service Company Act which subjects activities that banks could perform themselves, but which they choose to perform through service companies, to regulation and examination by the bank supervisory agencies.[12]

In addition, while in many medical financing arrangements a provider of medical services or products serves as the conduit through which the lender and the consumer are brought together, this provider has no role in evaluating the consumer's creditworthiness. Thus, while it may be appropriate for the ECOA to apply broadly to arrangers of credit in order to prevent arrangers from engaging in discrimination on a prohibited basis that effectively limits the availability of credit, it makes no sense to apply the prohibitions of section 604(g)(2) to providers of medical services and products simply because they are helping to arrange financing for a consumer. These entities will be in possession of medical information by virtue of the very nature of their activities. The incidental use of this information to assist the consumer in obtaining financing helps the consumer and would not result in the dissemination of medical information for any inappropriate purposes because, to the extent that the information was used to evaluate the creditworthiness of the individual, the information could only be used in connection with an exception recognized by the Agencies. To the extent that the provider of medical services and products was not involved in the actual determination of the consumer's creditworthiness because, for example, the provider merely forwarded information to the lender, the provider should not be considered to be obtaining or using medical information in connection with a determination of the consumer's eligibility for credit.

Given the day-to-day realities of the use of medical information in the provision of financial services, failing to expand the scope of the exceptions could significantly impact those persons covered by section 604(g)(2) but not by the Proposal. As discussed above, to ensure that the exceptions allow the entities covered by the Proposal to obtain and use medical information to extend credit to consumers for medical services and products, the Agencies should ensure that the exceptions include all entities that work with banking institutions and with affiliates of these institutions to provide financing for medical services and products.

[12] 12 U.S.C. § 1867(c).

The FTC is Authorized to Enforce Broad Exceptions

The Agencies should not limit the scope of the exceptions to the section 604(g)(2) prohibition because of concerns about the enforcement process. If the Agencies write regulations that provide exceptions for creditors that are beyond the Agencies' administrative enforcement jurisdiction, these creditors will be covered by the administrative enforcement jurisdiction of the FTC under the FCRA. Section 621(a) of the FCRA provides that the FTC must enforce the provisions of the FCRA "with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements . . . is specifically committed to some other government agency under subsection (b)." As a result, if an entity has duties under the FCRA, the entity will be under the FTC's enforcement authority, unless specifically covered by another agency under section 621(b). Sections 604(g)(2) and 604(g)(5)(A) do not limit the FTC's general enforcement authority and do not provide an enforcement structure that differs from sections 621(a) and (b). Accordingly, the FTC is required by section 621(a) to enforce compliance with section 604(g)(2) and with regulations providing exceptions to section 604(g)(2) with respect to any creditor under its jurisdiction.

In conclusion, AFSA appreciates the opportunity to comment on this very important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (202) 466-8609.

Sincerely,

H. R. Lively, Jr.
President and Chief Executive Officer